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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1980

STANLEY FISHMAN, CHRIST A. CHRIST, OLIVER McCRACKEN, WILLIS RARDIN, KERN DOERNER and KENNETH LUMB,

Petitioners,

vs.

TEACHERS' RETIREMENT SYSTEM OF THE STATE OF ILLINOIS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Question Presented for Review	1
Statement of the Case	1
Reasons for Denying the Writ	4
Conclusion	14

TABLE OF AUTHORITIES

Cases.

	PAGE
Andre v. *Board of Trustees,* 561 F. 2d 48 (7th Cir. 1977)	5
Biggs v. *Cummins,* 5 Ill. 2d 512, 126 N. E. 2d 208 (1955)	6
Craig v. *Boren,* 429 U. S. 190, 50 L. Ed. 2d 397 (1976)	7
Dunn v. *Blumstein,* 405 U. S. 330, 31 L. Ed. 2d 274 (1972)	4
Fishman v. *Teachers' Retirement System,* 86 Ill. App. 3d 649, 408 N. E. 2d 113 (1980)	2, 9, 10
Graham v. *Richardson,* 403 U. S. 365, 29 L. Ed. 2d 534 (1971)	7
Hamilton Corp. v. *Alexander,* 53 Ill. 2d 175, 290 N. E. 2d 589 (1972)	12
Johnson v. *Robison,* 415 U. S. 361, 39 L. Ed. 2d 389 (1974)	12
Langston v. *Levitt,* 425 F. Supp. 642 (S. D. N. Y. 1977)	5, 8
McCarthy v. *Philadelphia Civil Service Commission,* 424 U. S. 645, 47 L. Ed. 2d 366 (1976)	5
Massachusetts Bd. of Retirement v. *Murgia,* 427 U. S. 307, 49 L. Ed. 2d 520 (1976)	10
Morey v. *Doud,* 354 U. S. 457, 1 L. Ed. 2d 1485 (1957)	7
New York City Transit Authority v. *Beazer,* 440 U. S. 568, 59 L. Ed. 2d 587 (1979)	11
Norvell v. *State of Illinois,* 373 U. S. 420, 10 L. Ed. 2d 456 (1963)	12
People v. *Calderwood,* 333 Ill. App. 541, 77 N. E. 2d 849 (1948)	8, 9
People v. *Palkes,* 52 Ill. 2d 472, 288 N. E. 2d 469 (1972)	6

PAGE

People v. *Warren,* 11 Ill. 2d 420, 143 N. E. 2d 28 (1957) 12
Personnel Administrator of Massachusetts v. *Feeney,* 442 U. S. 256, 60 L. Ed. 2d 870 (1979) .. 8
Reed v. *Reed,* 404 U. S. 71, 30 L. Ed. 2d 225 (1971) 12
Rios v. *Dillman,* 499 F. 2d 329 (5th Cir.1974) 8
U. S. Railroad Retirement Bd. v. *Fritz,* ____ U. S. ____, 66 L. Ed. 2d 368 (1980) 9, 10, 11
United States Department of Agriculture v. *Moreno,* 413 U. S. 528, 37 L. Ed. 2d 782 (1973) 7
Vance v. *Bradley,* 440 U. S. 93, 59 L. Ed. 2d 171 (1979) 4

Constitutional and Statutory Provisions.

U. S. Const., Amend. XIV, § 1 1
Ill. Rev. Stat., 1977, ch. 108½, § 16-102 5
Ill. Rev. Stat., 1977, ch. 108½, § 16-106 5
Ill. Rev. Stat., 1977, ch. 108½, § 16-127 ..... 2, 5, 7, 8
Ill. Rev. Stat., 1977, ch. 122, § 21-1 5
Ill. Rev. Stat., 1977, ch. 122, § 24-4.1 5

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois statutory scheme granting military service retirement credits complies with the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Illinois Pension Code allows members of the Illinois Teachers' Retirement System the right to purchase retirement credits for periods spent in military service provided they were members of the System prior to the time they entered military

service and returned to teaching in Illinois within a designated period following discharge. The Illinois statutory scheme denies members of the System the right to purchase retirement credits for periods spent in the military service prior to the time they become members of the System. Ill. Rev. Stat., 1977, ch. 108½, § 16-127(5).

The petitioners filed a petition with the Board of Trustees of the Teachers' Retirement System seeking to purchase retirement credits under the System for their military service. All of the petitioners had served in the armed forces, and all were members of the System at the time of filing their petition with the Board. However, none of the petitioners were members of the System when they entered the armed forces. Petitioners C.A. Christ, Willis Rardin and Kenneth W. Lumb had not completed their education at the time they entered military service. Petitioner Stanley Fishman had completed his education but had not begun to teach. Petitioner Oliver McCracken had taught in Missouri for two years, returned to school for additional credits, enlisted in the army while in school, and became a member of the Retirement System seven years after his discharge. Petitioner Kern L. Doerner became a member of the Retirement System eight years after his discharge. (See *Fishman* v. *Teachers' Retirement System,* 86 Ill. App. 3d 649, 408 N. E. 2d 113, 115 (1980)).

The Board of Trustees denied the petition for the reason that none of the petitioners had been members of the System when they entered the armed forces. On administrative review, the Circuit Court of Sangamon County, Illinois, affirmed the Board's decision. On appeal, the Illinois Appellate Court, Fourth District, rejected petitioners' argument that under the express terms of the statute petitioner McCracken was entitled to purchase credits because he had taught in another state before he entered military service. The Appellate Court also held that the classifications created by the Illinois statute do not

violate petitioners' equal protection rights. The Appellate Court summarily rejected petitioners' contention that the classifications require strict scrutiny because they violate petitioners' right of interstate travel and are based on gender. The Appellate Court found that, under traditional equal protection principles, the two statutory classes involved are not similarly situated; further, the classifications created are not arbitrary and unreasonable. The Illinois Supreme Court subsequently denied the petitioners' petition for leave to appeal.

REASONS FOR DENYING THE WRIT

THE ILLINOIS STATUTORY SCHEME GRANTING MILITARY SERVICE RETIREMENT CREDITS COMPLIES WITH THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioners contend that the statutory classification denying them the right to purchase retirement credits for periods spent in the military service prior to the time they became members of the Teachers' Retirement System constitutes an equal protection violation under the Federal Constitution. Since there is more than one test for evaluating laws challenged under the equal protection clause, depending upon the interest affected or the classification involved, the Court must first determine what standard of review is appropriate. *Dunn* v. *Blumstein,* 405 U. S. 330, 31 L. Ed. 2d 274, 280 (1972). If a statute burdens a suspect group or a fundamental personal right, the Court will apply a stricter standard of scrutiny; otherwise, the Court presumes the constitutionality of a statutory classification and requires only that the classification challenged be rationally related to a legitimate state interest. *Vance* v. *Bradley,* 440 U. S. 93, 59 L. Ed. 2d 171 (1979).

A.

The Illinois Statutory Scheme Does Not Violate A Fundamental Right.

The petitioners suggest that this Court should apply strict judicial scrutiny regarding their equal protection claim because the classifications for military service credit violate the fundamental right of interstate travel. It is respectfully submitted that this contention is wholly without substance.

In the Appellate Court below, petitioners' argument in this regard was grounded on the claim that the Illinois statute

imposes an overly restrictive residency requirement. It was shown, however, that there is no residency requirement whatsoever regarding retirement credits for military service. Sections 16-127(5) and (6) of the Illinois Pension Code merely require a "member" of the Retirement System to have entered military service upon terminating employment as a teacher, and to have returned to employment as a teacher within one year after discharge. Ill. Rev. Stat., 1977, ch. 108½, §§ 16-127(5) and 127(6). To qualify as a "member" of the System, a person must be a certified teacher or other designated employee in the public common schools in cities or school districts of less than 500,000 population. Ill. Rev. Stat., 1977, ch. 108½, §§ 16-102; 16-106. Certification as a teacher in Illinois does not require residency in Illinois. Rather, § 21-1 of the Illinois School Code requires only that a person be a United States citizen and, in certain limited situations, even this is not required. Ill. Rev. Stat., 1977, ch. 122, § 21-1. The absence of any residency requirement is emphasized by an amendment to the School Code which specifically states that residency within any school district cannot be considered regarding compensation, promotion, assignment or transfer of teachers. Ill. Rev. Stat., 1977, ch. 122, § 24-4.1.

Furthermore, as the Appellate Court below found, even if the Illinois statute could be considered to implicitly require Illinois residency at the time a teacher entered the military service, such a requirement would still not violate the fundamental right of interstate travel. Only "durational" residency requirements infringe or penalize the right to travel. *McCarthy* v. *Philadelphia Civil Service Commission,* 424 U. S. 645, 47 L. Ed. 2d 366 (1976); *Andre* v. *Board of Trustees,* 561 F. 2d 48 (7th Cir. 1977). In *Langston* v. *Levitt,* 425 F. Supp. 642 (S. D. N. Y. 1977), which petitioners describe as "[t]he case most closely related to this matter" (Pet. Br. p. 18), the federal district court held that a state may condition benefits under a veteran's preference statute to residence within the state

at the time of entry into the military service, and may properly exclude veterans who later become residents without infringing upon their constitutional right to travel.

Petitioners have abandoned in this Court any claim that the Illinois statutory scheme imposes an overly restrictive residency requirement. The sum of petitioners' argument now amounts to no more than the following:

> The statute in question imposes an unusual requirement by granting credits only to those who were teachers in Illinois both before and after their terms of military service. This requirement has a chilling effect on the right of an individual to travel between the various states because it denies that individual the right to purchase military service retirement credits while extending such a right to Illinois teachers.
>
> (Pet. Br. p. 16)

Clearly, this conclusory generalization is insufficient to show the violation of a fundamental right. The Illinois Supreme Court has refused to reach the merits of such a general claim, holding that "constitutional issues cannot be raised by such general allegations." *People* v. *Palkes,* 52 Ill. 2d 472, 288 N. E. 2d 469, 471 (1972). The Illinois Supreme Court has emphasized:

> Where the constitutional validity of a statute is assailed the objection must be specific and complete. It is not enough merely to assert in a vague and general fashion that constitutional safeguards are violated. The particular respect in which the statute violates some constitutional limitation must be pointed out and preserved for review in order to obtain a determination of such questions by this court.
>
> (*Biggs* v. *Cummins,* 5 Ill. 2d 512, 126 N. E. 2d 208, 210 (1955).

Since petitioners' claim that a fundamental right has been violated is unsupported by any substantial factual or legal basis, this Court should not consider it.

B.

The Classifications Created by the Illinois Veterans Credit Statute Bear a Rational Relationship to a Legitimate State Purpose.

Under traditional equal protection principles, a state retains broad discretion to classify. *Graham* v. *Richardson,* 403 U. S. 365, 29 L. Ed. 2d 534 (1971). To pass constitutional muster, the test is not whether a statute results in unequal treatment, but whether the legislative classification bears a rational relationship to a legitimate state purpose. *United States Department of Agriculture* v. *Moreno,* 413 U. S. 528, 37 L. Ed. 2d 782, 787 (1973). Where purely economic matters are involved, as here, they "traditionally merit only the mildest review under the Fourteenth Amendment." *Craig* v. *Boren,* 429 U. S. 190, 50 L. Ed. 2d 397, 413 (1976). The burden is on the one who assails a legislative classification to show that "it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey* v. *Doud,* 354 U. S. 457, 1 L. Ed. 2d 1485, 1490 (1957).

It is clear that the classifications created by the instant Illinois statute are not arbitrary or unreasonable, but bear a reasonable relationship to a legitimate state purpose. It should be noted that the statutory scheme governing the Teachers' Retirement System evinces a strong public policy of not only attracting experienced teachers to the State of Illinois, but of encouraging experienced teachers to return to, and remain in, the teaching service in Illinois. First, § 16-127(3) of the Illinois Pension Code induces experienced teachers to seek employment in the public school in Illinois by affording them the opportunity to purchase retirement credits for their years of teaching service outside of Illinois, up to a maximum of ten years. Ill. Rev. Stat., 1977, ch. 108-1/2, § 16-127(3). Hence, out-of-state teachers who seek employment in Illinois are protected against a substantial loss of retirement benefits which they may have accumulated while outside of Illinois and which, in most instances, would be lost when the teacher pursues his career in

Illinois. The right to purchase retirement credits is likewise extended to teachers in Illinois who are not covered by the Teachers' Retirement System, such as teachers in the Chicago public schools, and who seek employment in schools covered by the System.

Section 16-127(5), which is involved in the instant case, evinces a separate but equally salutary public purpose which is accomplished by means of a rational classification. The statute permits teachers in Illinois whose professional careers are interrupted because of service in the military or a national emergency to purchase retirement credits for that period. The statute thus minimizes the loss in retirement benefits which the teacher and his family would suffer by virtue of the teacher's service in the armed forces in time of national need and urgency. As a result, the statute encourages experienced teachers who have already been part of the System to return to teaching in Illinois following their discharge from military service.

The legitimacy of the governmental interest in veterans preference legislation "is beyond serious judicial dispute." *Rios* v. *Dillman,* 499 F. 2d 329, 331 (5th Cir. 1974). A frequently stated objective of such laws is "to ease the transition from military to civilian life" (*Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256, 60 L. Ed. 2d 870, 879 (1979); that is, to aid in the rehabilitation of the veteran whose normal life style has been disrupted by military service (*Rios* v. *Dillman,* 499 F. 2d at 332), and to compensate veterans for the economic disruption to their civilian careers caused by the military. *Langston* v. *Levitt,* 425 F. Supp. 642, 645 (S.D.N.Y. 1977). The Illinois statute accomplishes the dual purpose of compensating Illinois teachers for the time lost from teaching service within the System while in the armed forces, and thus rewards "in a special way the men and women who answered the call to defend their country in time of war." See *People* v. *Calderwood,* 333 Ill. App. 541, 77 N. E. 2d 849, 852 (1948).

The issue here is not whether the legislature could have acted differently, but that the legislature did not act arbitrarily and capriciously in enacting the military service credit provision. Providing benefits for those persons who taught in Illinois before and after military service bears a rational relationship to the state's overall legitimate interest in securing "better governmental service by stabilizing employment and giving security to those in public service." *People* v. *Calderwood,* 77 N. E. 2d at 852. The instant Illinois statute was never intended to benefit all veterans, as petitioners seem to assert. Numerous other housing, educational and employment laws have been passed to do this. The Illinois statute was simply intended to compensate veterans whose service in the System was interrupted by time spent in the military. As the Appellate Court below stated:

> A state may reasonably deem itself to owe a greater responsibility to ease the transition to civilian life of those who were in its employ as teachers just prior to answering the call to military service than to veterans who were not among its teachers when answering that call.
> (408 N. E. 2d at 116)

Statutes like the one involved here, requiring membership in a retirement system at a given time in order to receive certain benefits, are not unusual. Many governmental services have a similar requirement. (See e.g., *People* v. *Calderwood, supra,* discussing the Illinois Fireman's Pension Act and the Police Pension Fund; also Ill. Rev. Stat., 1977, ch. 108½, § 15-113(i), concerning the State Universities Retirement System). Also, this Court recently examined the validity of federal legislation which, *inter alia,* limited "windfall" retirement benefits to railroad employees who had a "current connection" with the railroad industry at a certain point in time. In upholding the legislation against an equal protection claim, the Court noted in *U. S. Railroad Retirement Bd.* v. *Fritz,* ____ U. S. ____, 66

L. Ed. 2d 368 (1980), that the "current connection" test has been frequently used by Congress as an eligibility requirement for retirement benefits. The Court held that such test is not a "patently arbitrary" means for determining which employees are "career" employees, and that Congress could assume those who had a current connection with the railroad industry when the Act was passed in 1974 were more likely than those who had left the industry prior to 1974, and had never returned, to be among the class of persons who pursue careers in the railroad industry, "the class for whom the Railroad Retirement Act was designed." 66 L. Ed. 2d at 378.

Here, too, the Illinois legislature could assume that those who had a current connection with the Illinois teaching system at the time they entered military service, and who returned to the System following discharge, were more likely than those who had not yet taught in the System, or who never returned to the System, to be among the class for whom the Illinois Pension Code is designed, that is, the class of persons who pursue careers in the System. The desire to compensate those teachers in some measure for the disruption in their previous employment occasioned by military service, to express gratitude for such service, and to encourage experienced teachers to return to, and remain in, teaching service in the State following discharge is a rational basis for giving persons who previously taught in Illinois the right to purchase retirement credits. Likewise, as the Appellate Court below stated:

> Another reasonable basis of the classification may be to encourage young teachers likely to be called into the armed forces to take employment in the public schools of the state secure in the knowledge that, if called into the service, the time spent there will not be lost for pension purposes.
> (408 N. E. 2d at 116-17)

Legislative classifications will be upheld "unless they bear no rational relationship to the state's objectives." *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U. S. 307, 314, 49 L. Ed. 2d

520 (1976). Where, as here, there are "plausible reasons" for legislative action, this Court's "inquiry is at an end." *U.S. Railroad Retirement Bd.* v. *Fritz,* 66 L. Ed. 2d at 378. It is "constitutionally irrelevant" whether the reasoning set out above in fact underlay the Illinois legislative decision since this Court has "never insisted that a legislative body articulate its reasons for enacting a statute." *Id.* Similarly, it is of "no constitutional significance" that a classification may be under-inclusive, or that the degree of rationality is not as great regarding certain subparts of the classification as it is with respect to the classification as a whole. *New York City Transit Authority* v. *Beazer,* 440 U. S. 568, 59 L. Ed. 2d 587, 607 (1979). This Court has emphasized:

> The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favorite treatment be placed on different sides of the line." [citation omitted], and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. (66 L. Ed. 2d at 378-79)

In summary, the equal protection clause requires only a rational justification for the decision to classify, so long as classifications do not involve suspect criteria. The petitioners have failed to show that the Illinois classification does not bear a rational relationship to a legitimate state purpose and have, therefore, failed to sustain their burden of showing that the statute violates equal protection.

C.

The Illinois Veterans Credit Statute Operates Equally On All Persons Who Are Similarly Situated.

Petitioners essentially argue that if any members of the Teachers' Retirement System can purchase retirement credits for periods spent in the military, all must be allowed to do so. However, the Constitution does not require things which are

different in fact to be treated in law as though they were the same. *Norvell* v. *State of Illinois,* 373 U. S. 420, 10 L. Ed. 2d 456, 459 (1963). A statute is not unconstitutional because it affects one class of persons differently from others. *Reed* v. *Reed,* 404 U. S. 71, 30 L. Ed. 2d 225, 229 (1971); *Hamilton Corp.* v. *Alexander,* 53 Ill. 2d 175, 290 N. E. 2d 589, 591 (1972). Rather, the test of equal protection is whether legislation operates equally on all persons in the class to which it applies. *People* v. *Warren,* 11 Ill. 2d 420, 143 N. E. 2d 28, 34 (1957). Hence, a classification must be upheld so long as it is not arbitrary and is founded upon some substantial difference in circumstances or conditions properly related to the classification. *Johnson* v. *Robison,* 415 U. S. 361, 39 L. Ed. 2d 389 (1974); *Hamilton Corp.* v. *Alexander,* 290 N. E. 2d at 591.

There are substantial differences in circumstances and conditions between the classifications created by the instant statute, so that the classes involved are simply not similarly situated and need not be treated the same. Petitioners attempt to equate themselves with teachers whose professional careers were interrupted by the exigencies of hostilities or a national emergency. None of the petitioners were teaching immediately prior to entering military service. Thus, petitioners have not undergone the hardship which befalls a teacher whose career has been interrupted by military service. Also, petitioners' service in the military occurred prior to their entrance into the System and, therefore, any possible loss in retirement benefits is, at best, conjectural and speculative.

Petitioners rely on a hypothetical situation to establish an equal protection violation which rests on a highly questionable premise. (Pet. Br. pp. 10-11) Contrary to petitioners' assumption, persons who are allowed to purchase military service credits, and who accumulate thirty years of creditable service, will not necessarily receive greater retirement benefits than other persons who are denied the right to purchase military service credits and, therefore, accumulate only twenty-six years

of creditable service. The only difference between the two groups is not, as petitioners state, that one was allowed to purchase the credits and the other was not. The Retirement System embraces a great variety of employees (See Ill. Rev. Stat., 1977, ch. 108½, § 16-106), and retirement benefits are based on many different salary scales. For petitioners to suggest that the statutory classification be invalidated because two persons *might* be identically situated, *might* have made identical contributions and *might,* therefore, realize equal retirement benefits, except for the statute, is absurd.

The classification of persons who were members of the System prior to entering military service and those who were not are clearly not arbitrary. Rather, they are based on substantial differences in circumstances and are obviously related to the objectives of the statute. For this reason also, petitioners have not sustained their claim of violation of equal protection.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the petition for writ of certiorari to the United States Supreme Court be denied.

Respectfully submitted,

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